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No. 723

In the Supreme Court of the United States

OCTOBER TERM, 1965.

GUS N. KOUNTIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, GUS N. KOUNTIS, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINIONS OF THE COURT BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on December 1, 1964. It is not reported but appears in the certified, printed appendix filed herewith.

The original opinion of the United States Court of Appeals for the Seventh Circuit filed September 21, 1965, but not published, is set forth in the appendix to this petition.

The order of the United States Court of Appeals for the Seventh Circuit, denying a petition for rehearing is also set forth in the appendix to this petition.

JURISDICTION.

The order of the United States Court of Appeals, affirming the judgment and sentence of the United States District Court for the Northern District of Illinois, Eastern Division, was filed September 21, 1965. The petition for rehearing was denied on October 12, 1965. This petition is seasonably filed under Rule 22 of this Court.

Jurisdiction in this Court to review the judgment below is provided in 28 U.S.C. 1254 (1).

QUESTION PRESENTED.

Should not one who has abandoned a criminal enterprise before it achieved the evil sought to be prevented by Statute be entitled to successfully raise the defense of abandonment even though harmless included offenses were completed before the abandonment?

STATUTE INVOLVED.

Title 21 U.S.C. Section 174.

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing

the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000 . . ."

STATEMENT OF THE CASE.

The petitioner, GUS N. KOUNTIS, was indicted in two counts charging receipt, concealment, purchase, sale, and facilitation of the transportation, concealment and sale of narcotic drugs, contrary to the provisions of Title 21, U.S.C. Section 174.

On December 1, 1964 the petitioner was found guilty by the trial judge under both counts and sentenced to serve 10 years imprisonment on each count, to be served concurrently.

On September 21, 1965, the United States Court of Appeals affirmed the judgment and sentence.

On October 12, 1965 a petition for rehearing was denied.

STATEMENT OF FACTS.

The Government presented four witnesses on the trial of this case, none of which adequately established that the petition had sold 10 ounces of heroin to a Sylvester Moore as charged under the indictment (App. 8-15).

The trial court expressly recognized this lack of proof on that part of the charge (App. 15).

The petitioner, on the other hand, testified on the trial that he bought 6 ounces of heroin from Sylvester Moore in the afternoon of March 9, 1964, but that he repented his action and returned the heroin to Moore that evening at which time he was arrested. (App. 15-37).

His defense of abandonment based on the foregoing was rejected.

REASONS FOR GRANTING THE WRIT.

The court should grant the Writ of Certiorari because the opinion below has decided an important question of federal law which has not been, but should be, decided by this court.

There appears to be no substantial warrant in the record to dispute the fact that the defendant, having received, concealed and bought heroin from Sylvester Moore on March 9, 1964, repented and abandoned his unlawful conduct by returning the heroin to his supplier. This being the case, should he, nonetheless, be blindly punished because of his intermediate misconduct even though it was effectively aborted before it could achieve any social evil?

While recognizing the defense of abandonment, the few available authorities appear to take the position that the defense fails if prior to abandonment, the wrongdoer completes a lesser-included offense. *Wharton, Criminal Law,* 8th Ed., Vol. 1, Sec. 180, P. 215; *C.J.S., Criminal Law,* Sec. 29, P.99; *U.S.* v. *McCray,* 5th Cir., 276 F2d 705, 706.

Yet, this limitation does not seem to square with the arguments advanced by these same authorities elsewhere in their treatises.

For example, the editors of *Wharton, Criminal Law,* 8th Ed., Vol. 1 Sec. 187, P. 228, set forth compelling reasons for encouraging the violator to retreat from his unlawful behavior before harm is done:

> "For the doctrine that abandonment of an attempt not yet put in process of final execution is a defense, two reasons are given. First, the character of an

attempt is lost when its execution is voluntarily abandoned. There is no conceivable overt act to which the abandoned purpose could be attached. Secondly, the policy of the law requires that the offender, so long as he is capable of arresting an evil plan, should be encouraged to do so, by saving him harmless in case of such retreat before it is possible for any evil consequences to ensue. Neither society nor any private person, has been injured by his act. There is no damage, therefore to redress. To punish him after retreat and abandonment, would be to destroy the motive for retreat and abandonment."

Similarly, it is said in *C.J.S. Criminal Law,* Sec. 76, P. 234, that "abandonment is a defense if the attempt to commit a crime is freely and voluntarily abandoned before the act is put in process of final execution . . ."

The true rule should be, it would in logic seem, that one can and should be encouraged to abandon his criminal activities at any point before the social evil endeavored to be prevented by law has finally occurred. To withhold the defense at any earlier point appears self defeating if not, indeed, pharisaical.

CONCLUSION.

For the foregoing reason, Gus N. Kountis, seeks the Writ of Certiorari.

Respectfully Submitted,

Daniel C. Ahern,
Attorney for the Petitioner

APPENDIX.

September 21, 1965

Before Hastings, *Chief Judge,* DUFFY and CASTLE, *Circuit Judges.*

DUFFY, *Circuit Judge.* After a trial before the Court, defendant was found guilty of receiving, concealing, buying, selling and facilitating the transportation, concealment and sale of narcotic drugs. A mandatory minimum sentence of ten years was imposed.

On this appeal, defendant makes three principal points. He urges the defense of abandonment; that an admission by defendant, received in evidence over objection, was elicited by government agents through an unlawful inquiry after arrest, and that the Court erred in admitting the contents of a telephone conversation.

Agents of the Federal Bureau of Narcotics testified as to two separate meetings on the same day between defendant and one Sylvester Moore. On each occasion, defendant was seen handing Moore paper bags. Moore was searched. The bags were found to contain heroin.

Defendant was arrested some time after 8 p.m. The agents, accompanied by defendant, arrived at their office at about 9 p.m. Defendant was advised of his rights. He was told that he need not make a statement and was given the opportunity to obtain the services of an attorney. He was fingerprinted and photographed. Thereafter, he admitted the heroin here in question belonged to him. Within two hours after his arrest, defendant was taken to the police lockup. There were no further questions.

Defendant contends the narcotic agents violated his constitutional rights by questioning him after his arrest. Defendant relies on *Mallory* v. *United States,* 354 U.S. 449, and *United States* v. *Wong Sun,* 371 U.S. 471.

In *Mallory*, a confession was excluded from evidence. The 19-year old defendant was of "limited intelligence." He was questioned continuously for five hours following his arrest. He was not informed of his right to counsel nor was he told that he could remain silent. The aggravated circumstances of *Mallory* are completely lacking here.

In *Wong Sun*, there was an illegal arrest. That is not true in the case at bar. In our view, neither *Mallory* nor *Wong Sun* is controlling.

Defendant's counsel admitted on oral argument there is little precedent for his defense of abandonment. He relies upon statements in Wharton on Criminal Law and Corpus Juris Secundum. The general idea of his defense is that "abandonment" should be considered a defense if the attempt to commit a crime is abandoned before the act is finally executed.

In reviewing this record, we consider the evidence in the light most favorable to the government. *United States* v. *Iacullo*, 7 Cir., 226 F. 2d 788, 795. We do not think an abandonment of criminal intent is shown in this case. We hold the defense of abandonment is not available to the defendant herein.

Defendant next contends that Section 605 of the Federal Communications Act of 1934 was violated by agent Jackson when he listened over an extension telephone receiver to the conversation between defendant and Sylvester Moore with Moore's knowledge and consent. We hold that such a course of conduct is not an "interception" of the message within the meaning of the statute and was, therefore admissible into evidence. *Rathbun* v. *United States*, 355 U.S. 107; *United States* v. *Williams*, 7 Cir., 311 F. 2d 721.

Finding no error, the judgment of conviction must be and is

AFFIRMED.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Tuesday, October 12, 1965.

Before

Hon. JOHN S. HASTINGS, Chief Judge

Hon. F. RYAN DUFFY, Circuit Judge

Hon. LATHAM CASTLE, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. GUS N. KOUNTIS, *Defendant-Appellant.* No. 15025	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 723

GUS N. KOUNTIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, after waiving a jury trial, was convicted in the United States District Court for the Northern District of Illinois on a two-count indictment charging the unlawful receipt, concealment, purchase, and sale of unlawfully imported heroin, in violation of 21 U.S.C. 174. He was sentenced to imprisonment for ten years on each count, the sentences to run concurrently. The court of appeals affirmed the conviction on September 21, 1965. A petition for rehearing was denied on October 12, 1965. The petition for a writ of certiorari was filed on November 5, 1965.

Petitioner's sole contention is that the trial court erred in rejecting his defense of "abandonment". The government's evidence showed that on the afternoon

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of March 9, 1964, petitioner was seen to hand one Moore a tan paper bag. Moore was followed and arrested. Four glassine bags of heroin were taken from a paper bag in Moore's car (A. 8–9, 12).[1] Later the same day, after telephoning Moore and stating that he had the "other stuff" (A. 14–15), petitioner delivered to Moore a second package which was found to contain six glassine bags of heroin (A. 9, 12–14).

Petitioner testified that Moore had been pressing him to get back in the narcotics business (A. 18–22). On the afternoon of March 9, he testified, Moore gave him some clothes in a plastic bag and a package to deliver (A. 24–26). The package consisted of a brown paper bag inside of which was a smaller paper bag containing narcotics (A. 25–26, 35–36). Petitioner placed the clothes and the small bag of narcotics in his automobile, then returned the empty, larger paper bag to Moore since Moore was concerned that it was covered with his fingerprints (A. 25, 35–36). In the evening petitioner called Moore and said he wanted to get rid of the "other stuff" (A. 26). That was how he happened to give Moore the package at the time of his arrest (A. 28–29). He testified that he admitted the "stuff" was his because the agents threatened to disgrace his family and "shake up" the house of his brother-in-law (A. 31). In rebuttal the narcotics agent testified that petitioner was not carrying a clothes bag in his hand when he crossed over to his

[1] "A." refers to the printed appendix filed in the court of appeals.

car from Moore's (A. 37). The agent denied threatening to disturb petitioner's family (A. 38).[2]

Petitioner's argument is based on the premise that by returning the heroin he had manifested an abandonment of his criminal enterprise. As noted by the court of appeals, however, the record does not disclose any abandonment of criminal intent (Pet. App. 2a). Even if it did, however, a belated repentance would not alter the fact that petitioner had concededly received and concealed the heroin in direct violation of law.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
RONALD L. GAINER,
Attorneys.

DECEMBER 1965.

[2] Moore's explanation of the events was not available since he had been killed prior to trial (A. 33).

U.S. GOVERNMENT PRINTING OFFICE: 1965